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FIRST GENERAL COUNSEL'S REPORT

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MUR: 6163

DATE COMPLAINT FILED: January 26, 2009

LAST RESPONSE RECEIVED: March 25, 2009

DATE ACTIVATED: May 5, 2009

EXPIRATION OF STATUTE OF LIMITATIONS:

October 25, 2013 / November 3, 2013

COMPLAINANT:

Jeff Timmer on behalf of the Michigan Republicans

RESPONDENT:

Houghton County Democratic Committee

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 431(4)

2 U.S.C. § 431(9)

2 U.S.C. § 431(17)

2 U.S.C. § 433(a)

2 U.S.C. § 434

2 U.S.C. § 441d

11 C.F.R. § 100.5(c)

11 C.F.R. § 100.14(b)

11 C.F.R. § 100.22

11 C.F.R. § 100.26

11 C.F.R. § 100.52

11 C.F.R. § 102.2

11 C.F.R. § 104.1

11 C.F.R. § 104.3

11 C.F.R. § 104.4

11 C.F.R. § 105.4

11 C.F.R. § 106.1(a)

11 C.F.R. § 109.10

11 C.F.R. § 110.11(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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I. INTRODUCTION

The complaint alleged that the Houghton County (Michigan) Democratic Committee ("HCDC" or "the Committee"), a local party committee of the Michigan Democratic Party, has failed to register with and report to the Federal Election Commission ("the Commission") as a federal political committee despite exceeding the threshold for federal political committee status by making expenditures of over \$1,000 for a flyer, a newspaper advertisement, and radio ads that "promoted or supported" the election of federal candidates Barack Obama, Joe Biden, Carl Levin, and Bart Stupak, in violation of 2 U.S.C. §§ 433(a) and 434 of the Federal Election Campaign Act of 1971, as amended ("the Act"). Complaint at 2-3. In addition, the complaint alleged that the HCDC's "public communications ... probably failed to include the appropriate disclaimer in violation of 2 U.S.C. § 441d(a)." Complaint at 4.

The response asserted that the Committee's federal expenditures did not meet the \$1,000 threshold for expenditures and that its exempt activities did not meet the \$5,000 threshold for exempt activities. *See* 2 U.S.C. §§ 431(4)(C) and 431(9)(B)(iv). The response does not address the disclaimer allegations.

The available information indicates that the total amount of the HCDC's expenditures did not exceed the Act's thresholds requiring registration and reporting as a political committee. *See* 2 U.S.C. § 431(4)(C). However, it does appear that the Committee failed to place a disclaimer on its newspaper insert and failed to report independent expenditures. Nevertheless, for the reasons set forth below, we recommend that the Commission exercise its prosecutorial discretion and dismiss the complaint with a cautionary letter to the Houghton County Democratic Committee and close the file. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

II. FACTUAL AND LEGAL ANALYSIS

The complaint asserts that only federal funds were permitted to be utilized by the HCDC for a newspaper advertisement, radio ads and flyers that promoted or supported the federal candidates Barack Obama, Joe Biden, Carl Levin and Bart Stupak, and that the costs of such "public communications" constitute expenditures under the Act. Complaint at 2-3. As a result of spending \$1,682.00 on these communications, plus another \$397.20 spent on Barack Obama yard signs, the complaint concludes that the HCDC spent more than \$1,000 on expenditures during 2008 and thus met the Act's political committee status threshold. *Id.* at 3.

A. Political Committee Status

The HCDC appears to meet the definition of a "local committee of a political party," that is, an organization that by virtue of the by-laws of a political party or the operation of State law is part of the official party structure, and is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State. 11 C.F.R. § 100.14(b). The name of the Committee, the activities that the HCDC undertook during the 2008 campaign as detailed in the complaint and the response, and the identification of itself on the slate card as "[y]our Houghton Democratic Party" all appear to support the identification of the HCDC as a local committee of a political party. Moreover, the HCDC files state disclosure reports as a political party committee. Any local committee of a political party which receives contributions aggregating in excess of \$5,000, makes \$5,000 in payments exempted from the definition of contribution or expenditure, makes contributions aggregating in excess of \$1,000, or makes expenditures aggregating in excess of \$1,000 during a calendar year meets the definition of a political committee. 2 U.S.C. § 431(4)(C). Political

committees must file a Statement of Organization with the Commission within 10 days of meeting the threshold definition found in 2 U.S.C. § 431(4)(C), and must file reports that comply with 2 U.S.C. § 434. 2 U.S.C. §§ 433(a), 434(a)(1); *see also* 11 C.F.R. §§ 102.2, 104.1, 105.4.

1. Expenditures

a. Newspaper Insert (Slate Card)

Citing the Committee's Michigan Bureau of Elections reports (attached to the complaint), the complaint alleges that the HCDC made expenditures of \$530 for an ad in the *Daily Mining Gazette* and \$300 for a flyer, which both "promoted or supported ... candidates for Federal office" as well as state and local candidates. Complaint at 2-3, ¶¶ 7, 11. Although described in two different ways in the state disclosure reports, the response states that both of these payments were for distribution of copies of a slate card that were inserted into copies of the *Daily Mining Gazette* for general distribution.¹ Response at 2; *see* insert at Attachment 1. The response asserts that these expenses can be allocated on a time/space split, which the response states is \$257.30 for the federal portion of the \$830 total costs, as there were four federal candidates listed among the total of thirteen candidates equally promoted on the flyer.² Response at 2.

In determining whether an organization makes an expenditure, the Commission "analyzes whether expenditures for any of an organization's communications made independently of a candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." *See Political Committee Status: Supplemental Explanation and Justification*, 72 Fed. Reg. 5595, 5606 (February 7, 2007). The newspaper insert contains

¹ The response distinguishes the slate card inserted into the newspaper from "a public communication such as an ad in the *Daily Mining Gazette*," *see* Response at 2, but does not claim exemption from the expenditures limit based on this alleged distinction.

² Four-thirteenths of \$830 is actually \$255.38, rather than \$257.30.

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express advocacy under 11 C.F.R. § 100.22(a) because the insert reads "Remember to Vote! Tuesday, November 4! Your Houghton Democratic Party is proud to present the 2008 Democratic nominees" and then includes a list of Democratic candidates, listing Barack Obama, Joe Biden, Carl Levin, Bart Stupak (four federal candidates) along with nine State and local Democratic candidates. See Attachment 1. The use of the so-called magic word "Vote" next to the list of Democratic nominees in context can have "no other reasonable meaning" than to urge the election of the featured federal candidates. See 11 C.F.R. section 100.22(a); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates).

The Commission's regulations further provide that express advocacy includes communications containing an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b). The IICDC's newspaper insert contains an electoral portion that is unambiguous and suggestive of only one meaning – an exhortation to remember to vote for the 2008 Democratic nominees. Accordingly, under either 11 C.F.R. § 100.22(a) or (b), the newspaper insert appears to constitute express advocacy.

IICDC's response to the complaint argues that only costs associated with the federal portion of the advertisements count towards the \$1,000 expenditure threshold. See 11 C.F.R. § 106.1(a)(1) and (c)(3). The IICDC newspaper insert addresses both federal and state candidates. See Attachment 1. The HCDC calculated the allocation between federal expenditures and non-federal disbursements on a space ratio basis, resulting in a federal portion

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of 4/13 of the \$830 spent by the HCDC on the newspaper inserts, or \$255.38, counting toward the \$1,000 expenditure threshold for political committee status. *See* 2 U.S.C. § 431(4)(C); *see generally* 11 C.F.R. § 106.1(a).

b. Radio Advertisements

Again citing the Committee's Michigan Bureau of Elections reports attached to the complaint, the complaint alleges that the HCDC spent \$234 for radio ads on Eagle Radio, \$220 for radio ads on Heartland Communications, and \$198 for radio ads on radio station WMPL, all of which are expenditures counting toward the HCDC's political committee status threshold. Complaint at 2-3, ¶¶ 8-10. The Committee asserts in response that these payments went toward six radio ads, of which only three mentioned a federal candidate. Response at 2. The Committee calculates \$324.50 – the cost of the three ads referencing federal candidates – as “federal election activity” and “federal expenditures.” *Id.* Neither the complaint nor the response included transcripts or recordings of these radio advertisements, so the Commission cannot independently verify at this time which radio ads addressed federal candidates or whether these advertisements expressly advocated the election of such candidates. However, even if the entire cost of all the radio ads, \$652.00, is added to the amount calculated above as the federal expenditures portion of the newspaper inserts, \$255.38, the total is \$907.38, less than the \$1,000 in federal expenditures required for the political committee status threshold. *See* 2 U.S.C. § 431(4)(C), *see generally* 11 C.F.R. § 106.1(a). There therefore appears to be no reason to believe that the Committee violated 2 U.S.C. §§ 431(4)(C), 433, or 434.

2. Exempt Activity

The complaint further alleges, in reliance on the Committee's Michigan Bureau of Elections reports, that the HCDC made additional expenditures of \$200 for a flyer and \$397.20

for Obama yard signs. Complaint at 2-3, ¶¶ 6 and 12. The response asserts that the \$200 flyer was a slate card distributed door-to-door by volunteers, and therefore qualifies as exempt party materials exempted from the Act's expenditure definition and subject to a \$5,000 threshold before political committee status is triggered. Response at 1; *see also* 2 U.S.C. §§ 431(4)(C) and 431(9)(B)(iv); 11 C.F.R. § 100.140. The response also asserts that the Obama lawn signs were distributed by volunteers and therefore are an exempt expense of \$397.20. Response at 1; *see also* 11 C.F.R. § 100.147.

As described, the slate card distributed by volunteers and the Obama yard signs distributed by volunteers appear to be materials or activities exempt from the definition of expenditure, and therefore the \$597.20 spent on those items should not be counted toward the \$1,000 expenditure threshold for political committee status. Instead, it should count toward the \$5,000 threshold for exempt activities, which is not met by the HCDC based on the available information. *See* 2 U.S.C. §§ 431(4)(C) and 431(9)(B)(iv); 11 C.F.R. §§ 100.140 and 100.147.

B. Permissible Funding

Regardless of whether a local party committee exceeds one of the registration thresholds making it a federal political committee, it must finance activities in connection with federal election activity with funds that comply with the federal contribution limits and prohibitions. 11 C.F.R. § 102.5(b), *see also* 11 C.F.R. § 300.32(a)(2). The committee must demonstrate through a reasonable accounting method that it has received sufficient funds subject to the limitations and prohibitions of the Act to fund its federal expenditures and exempt activity. *See* 11 C.F.R. § 102.5(b). The HCDC's response did not address the permissibility of the funds it used. However, the Michigan Campaign Finance Act has equivalent prohibitions and limitations to those in the Act, and therefore all of the HCDC's funds should be appropriate federal funds.

See M.C.L. §§ 169.254, 169.242, and 169.244. Moreover, the Committee's Michigan Bureau of Elections Pre-General Election report, filed on October 25, 2008, appears to indicate that the HCDC had sufficient funds subject to the limitations and prohibitions of the Act, in that the report detailed year-to-date donations of \$6,369.50, none of which appear to have been in amounts greater than the Act's limits or to have been made by entities prohibited from making federal contributions. (Report available online at http://miboecfr.nictusa.com/cgi-bin/cfr/com_del.cgi?com_id=2193, last accessed on September 9, 2009). Accordingly, the HCDC appears to have made its expenditures and paid for its exempt activity with federally permissible funds.

C. Disclaimers

The complaint alleged that the HCDC's public communications "probably" failed to include appropriate disclaimers. Complaint at 4. The response does not address this allegation. All public communications, as defined in 11 C.F.R. § 100.26, that expressly advocate the election or defeat of a clearly identified candidate must include appropriate disclaimers. 11 C.F.R. § 110.11(a); *see also* 2 U.S.C. § 441d. Section 100.26 defines "public communications" as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 11 C.F.R. § 100.26. In this matter, the slate card distributed both by volunteers and as a newspaper insert does not contain any disclaimer. *See* Attachment 1.

The portion of the slate cards that were distributed by volunteers in a door-to-door canvass does not appear to be a public communication as defined by the Act, and therefore would not require a disclaimer. *See* 11 C.F.R. §§ 100.26 and 110.11(a). The slate cards distributed as

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1 newspaper inserts, however, appear to be a public communication by means of a newspaper.
2 Also, as discussed above, the newspaper inserts appear to expressly advocate the election of
3 federal candidates. Therefore, the newspaper inserts required, and failed to contain, a disclaimer
4 stating that the HCDC paid for the communication and whether or not the communication was
5 authorized by any federal candidate or candidate's committee. *See* 2 U.S.C. § 441d(a); 11 C.F.R.
6 § 110.11(h). Neither the complaint nor the response included a transcript or recording of the
7 radio advertisements, so we cannot determine whether the radio advertisements expressly
8 advocated for federal candidates and, if so, whether they contained conforming disclaimers.
9 However, the HCDC does appear to be in violation of 2 U.S.C. § 441d at least as to the
10 newspaper inserts.

11 **D. Independent Expenditure Reporting**

12 The newspaper inserts also appear to be independent expenditures pursuant to 2 U.S.C.
13 § 431(17) because, as discussed above, they expressly advocate the election of clearly identified
14 candidates, and the advertisements do not appear to have been made in cooperation, consultation,
15 or concert with, or at the request or suggestion of, a candidate, a candidate's authorized
16 committee, or their agents.³ 2 U.S.C. § 431(17); *see also* Attachment 1. Under the Act, every
17 person other than a political committee who makes independent expenditures in excess of \$250
18 must file a report that discloses information on its expenditures and identify each person who
19 made a contribution in excess of \$200 for the purpose of furthering an independent expenditure.
20 *See* 2 U.S.C. § 434(c). Even though the HCDC has not exceeded the political committee status
21 threshold, it still would have been required to report, at a minimum, the \$255.38 in allocated

³ It is not possible to determine at this time whether the radio advertisements were independent expenditures because the Commission does not have recordings or transcripts of the ads from which to determine whether the radio ads expressly advocate for the election of any federal candidate.

1 federal expenditures for the newspaper insert advertisements because they were independent
2 expenditures of more than \$250 for the 2008 general election. *See* 11 C.F.R. § 106.1(a)(1).
3 Thus, the HCDC's failure to report the independent expenditures appears to be a violation of the
4 Act. *See* 2 U.S.C. § 434(c).

5 **E. Conclusion**

6 Although there is no reason to believe that the HCDC met the threshold for political
7 committee status set out in 2 U.S.C. § 431(4)(C), and therefore there is no reason to believe that
8 the HCDC violated the registration and reporting requirements of 2 U.S.C. §§ 433(a) or 434(a),
9 the HCDC may have violated 2 U.S.C. §§ 434(c) and 441d. However, due to the circumstances
10 of this case, including the modest amount in violation, pursuit of this matter would not merit the
11 further use of Commission resources. *See* Statement of Policy Regarding Commission Action in
12 Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545-6 (Mar. 16,
13 2007). Accordingly, we recommend that the Commission exercise its prosecutorial discretion
14 and dismiss the complaint, include a cautionary notification to the HCDC regarding the
15 disclaimer requirements and the independent expenditure reporting requirements of the Act in the
16 closing letter, and close the file. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

17 **III. RECOMMENDATIONS**

- 18 1. Find no reason to believe the Houghton County Democratic Committee violated
19 2 U.S.C. §§ 433 or 434 by failing to register and report as a political committee.
20
21 2. Dismiss the complaint as to the allegations that the Houghton County Democratic
22 Committee violated 2 U.S.C. §§ 434(c) and 441d.
23
24 2. Approve the attached Factual and Legal Analysis.
25
26 3. Approve the appropriate letter.
27
28

4. Close the file.

Thomasenia P. Duncan
General Counsel

9-11-09
Date

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